# MALAYSIAN REPORTS

## TAN GUAN CHENG & ANOR. v. KUALA LUMPUR, KLANG & PORT SWETTENHAM OMNIBUS CO. LTD.

**[O.C.J. (Abdul Hamid J.) February 26, 1970]**

**[Kuala Lumpur — Civil Suit No. 2004 of 1968]**

*Damages — Personal injuries — Pelvis fracture and ruptured urethra — 8 year old child — Likelihood of being impotent and sterile — Past, present and future suffering.*

*Negligence — Contributory negligence — Infant.*

The first plaintiff, a school boy aged 8, claimed damages for personal injuries suffered by him and caused by the negligence of the driver and/or conductor, the servants or agents of the defendants in driving, use and management of a motor bus. On the morning of July 13, 1967 the first plaintiff fell off the said bus while he was boarding it. He suffered: "(1) Laceration 4" long over lateral aspect of (L) knee and thigh involving skin and subcutaneous tissue; (2) fracture of pelvis with ruptured urethra; (3) bruises in both groins and perinaeum; (4) bleeding from urethra — evidence of ruptured urethra." "X-ray also showed a fracture of the upper part (L) fibula. Patient was catheterised (introduction of tube into urethra) being unable to void any urine. On the same night his laceration was sutured and because of the loss of blood, he was given blood transfusion. Being unable to pass urine normally, a supra-pubic cystostomy was done on 17th July, 1967, an opening in the bladder was made through the abdomen and a rubber tube was left in. His left leg and thigh were put in a plaster cast for the fracture of the small bone in the left leg."

**Held:** (1) the court should take into account the age of the boy in considering whether he was liable for contributory negligence. On the facts of the case and in view of his tender age, the first plaintiff could not be held liable for negligence. The defendants were therefore liable for the negligence of their servants;

(2) whilst the proper basis should be of fair and reasonable compensation for past, present and future pain and suffering, in this case, some consideration might also be given on the basis of a fair and reasonable compensation for some financial expenses which might be incurred in pursuing medical treatment;

(3) taking into consideration the injuries suffered and bearing in mind the factors in the case, general damages at $20,000 would be a fair and reasonable compensation.

*Cases referred to:-*

(1) *Woods* v. *King* (1962) 1 Kemp & Kemp 3rd Edn. pp. 189 & 219.

(2) *Ghulam Hussein* v. *Shaharom & Anor.* [1966] 1 M.L.J. xxxiv.

(3) *Lim Yeow Hong & Anor.* v. *Oh Pang* [1968] 2 M.L.J. ii.

CIVIL SUIT.

*Denis Murphy* (*David Tay* with him) for the plaintiffs.

*Lall Singh* for the defendants.

*Cur. Adv. Vult.*

**Abdul Hamid J.:** The first plaintiff (an infant), suing by his father and next friend Tan Chin Hock, is claiming damages for personal injuries suffered by him and the second plaintiff, the father of the first plaintiff, is claiming for consequential loss and damage suffered by him and caused by the negligence of the driver and/or conductor, the servants or agents of the defendants in driving, use and management of motor bus No. BG. 1995.

The plaintiffs' case is briefly as follows. On 13th July 1967 in the morning, the first plaintiff (P.W. 2) a school boy aged 8 years, together with his younger brother and elder sister waited for a bus at the bus stop at 3¾ mile, Klang Road, Kuala Lumpur, to go to school. Altogether there were about 40 school children waiting to board the bus. The bus arrived and stopped. Four or five of the children boarded the bus. P.W. 2 began to board the bus, his right foot was on the bus, his hand holding the railings while his left foot was still on the ground. The bus moved forward and the plaintiff was thrown off balance, fell, and was injured. The left rear wheel of the bus grazed his left knee and thigh.

The defendants' driver, Tan Kim Swee (D.W. 1) stated that he drove the bus to the bus stop to pick up school children. As he drove the bus partly into the bay of the bus stop, the conductor shouted, "stop" saying that a child was injured at the back of the bus. He stopped the bus, got down, and saw the boy at the rear wheel. He also stated that he was travelling at 5 to 10 miles per hour while entering the bay [illegible] usually carries about 40 to 50 children.

After considering the evidence adduced by the plaintiffs, I find that while conflicting versions were given regarding the manner in which P.W. 2 fell off the bus, all the witnesses testified that after some children had alighted, and while P.W. 2 was boarding the bus, it moved forward causing him to fall. Though I cannot place much reliance on the evidence of P.W. 2 and his sister (P.W. 3) as they are, I think, interested witnesses, I am, however, impressed by the evidence of P.W. 4. D.W. 1 maintains that on one boarded the bus before the accident and alleges that the conductor was standing at the door when he drove the bus to the bus stop. In the light of the facts of this case, I am unable to accept D.W. 1's evidence on this point. Even assuming that the conductor was at the door when the bus was proceeding from the station to the bus stop, it is not established that at the time when the bus halted, the conductor was in fact standing there.

Bearing in mind that D.W. 1 was mainly occupied with the control of the vehicle, it is not unreasonable to conclude that he most probably assumed that this was so. The fact that some children did manage to board the bus, tends to show that the conductor could not have been there.

The statement of claim alleges that the bus drove off prematurely, causing P.W. 2 to be thrown off the bus. The defendants, however, contend that P.W. 2 suddenly rushed towards the bus before the bus had stopped and ran into the path of the bus, knocking the rear left wheel.

It is necessary for me to consider whether, in this particular case, the bus had actually come to a complete halt when P.W. 2 was attempting to board the bus. P.W. 3 and P.W. 4 stated that when the bus came to a stop, the first time, the children rushed in.

D.W. 1 on the other hand, stated that the bus had not entirely pulled up yet when the conductor cried out to him to stop. D.W. 1 adds by saying, "I normally stop at the shed. On that day, I stopped the bus before reaching the shed. Now I say that the front of the bus was at the shed but the bus was not parallel to the shed yet. I was then pulling in." These words have apparently I think, summed up what actually happened. On arrival at the bus stop, D.W. 1 stopped the bus before reaching the shed. The children rushed to get into the bus. P.W. 2 was then in the act of boarding the bus when D.W. 1 moved the bus forward to bring it parallel to the shed. P.W. 2 was thrown off balance and fell.

D.W. 1 did not deny that it was usual for the children to rush to board the bus. Knowing this he ought to have exercised proper care when driving or moving the bus at or around the bus stop. Having brought the bus to a stop, he ought not to have driven forward without first ascertaining personally or from the conductor, and indeed without first satisfying himself that it was safe to do so. In my view, the conductor too had failed to exercise proper care to see that no one boarded or attempted to board the bus. As a conductor he knew or ought to have known whether the driver had intended to stop or to proceed further. D.W. 1, who was the only witness called by the defence, was unable to account for the accident. There was no evidence at all to support the defence contention that P.W. 2 rushed towards the bus before it had stopped, and that he (P.W. 2) ran into the path of the bus knocking the rear wheel. True it cannot be denied that P.W. 2 was one of those who rushed to board the bus as and when it stopped, nevertheless, I hold that no blame could, in the circumstances, be attached to him. There was not a shred of evidence to show that the conductor had warned or prevented or indeed had taken any steps to warn or to prevent the children from boarding. While on the question of contributory negligence, the court shall also take into account the age of the boy in considering whether he is liable for contributory negligence. The question before the court is whether, assuming that by rushing to board the bus there was a failure to exercise reasonable care for his own safety, he has failed to show care to be expected of a child of his years? In the circumstances of this particular case, I am of the opinion that in view of his tender age, he cannot be held liable for negligence. I therefore hold that there was no contributory negligence on the part of P.W. 2 For these reasons, I find the defendants liable for the negligence of their servants.

As regards damages, counsel for both parties agree that special damages be fixed at $2,355.90. This amount does not however include future hospital expenses, a factor which counsel for the plaintiffs has urged the court to take into consideration when assessing general damages.

P.W. 2 was admitted to the orthopaedic ward on the 13th of July, 1967, suffering from the following injuries: —

"(1) Laceration 4" long over lateral aspect of (L) knee and thigh involving skin and subcutaneous tissue.

(2) Fracture of pelvis with ruptured urethra.

(3) Bruises in both groins and perinaeum.

(4) Bleeding from urethra — evidence of ruptured urethra."

"X-ray also showed a fracture of the upper part (L) fibula. Patient was catheterised (introduction of tube into urethra) being unable to void any urine. On the same night his laceration was sutured and because of the loss of blood, he was given blood transfusion. Being unable to pass urine normally, a suprapubic cystostomy was done on 17th July, 1967, an opening in the bladder was made through the abdomen and a rubber tube was left in. His left leg and thigh were put in a plaster cast for the fracture of the small bone in the left leg."

On 26th July 1967, an operation was done in an attempt to repair the completely ruptured urethra. A second operation was unsuccessful. In between this period, he had dilation of the urethra. Another operation was done on 19th December 1967 and a permanent suprapubic tube was left in the bladder. Dr. G. Sreenevesan of the General Hospital, Kuala Lumpur confirms that at the moment, P.W. 2 has no control over his urine and he is more liable to get infection as stated in the report of Dr. D. D. Chelvanayagam, his assistant. He believes that P.W. 2 may become impotent and invariably may become sterile. He however, feels that only 25% of cases of this nature the patient becomes impotent. Asked whether the urethra could be repaired, he states that in America or England, it could. The success rate is 100%. It is a plastic repair using the patient's own skin. Operation is now done here in 7 stages. The patient has to undergo two or three operations. P.W. 2 was discharged on 31st December 1967, after spending approximately 5½ months in the hospital. Thereafter he attended the hospital once in every 3 weeks for the change of the suprapubic tube. P.W. 2 was re-admitted on 3rd April 1968 and had an operation on 4th April 1968 and was kept for 2 months until 29th May 1968. He was further re-admitted on 2nd July 1969 and an operation was done on 15th January 1970. These two operations were done for purposes of carrying out the first stage of the plastic repair. The plaintiff was discharged on 19th January 1970. According to the doctor, it will take six months before the second stage could be performed, depending of course, whether the first stage is successful. Asked whether plaintiff suffered pains, Dr. Sreenevesan states that P.W. 2 suffered pains after operations, and thereafter mainly discomfort. In his opinion, later on in life, P.W. 2 can work as any other normal person.

Mr. Murphy cited the case of *Woods* v. *King*[1] as set out in *Kemp & Kemp, 3rd edition, Vol. 1 pages 189 and 219* where a foreman sausages-casing selector, 35 years old, earning £17 10s a week and receiving £70 bonus yearly suffered amongst other injuries disruption of two halves of the pelvis at the pubic symphysis resulting in permanent and complete paralysis of muscle controlling micturition. He had dribbling incontinence both by day and by night. Interruption of the pelvic nerves led to virtually complete impotence. The pubic injury would continue to cause recurrent low back-ache and might give rise to osteoarthritis in later life. General damages of £10,000 was awarded.

Mr. Murphy also cited two other cases, *Ghulam Hussein* v. *Shaharom & Anor.*,[2] where Abdul Aziz J.

awarded $45,000 general damages. The other case is a Singapore case, *Lim Yeow Hong and Anor.* v. *Oh Pang*[3] where $7,500 was awarded as general damages, $5,500 for the partial rupture of the urethra.

*Woods* v. *King* does not, to my mind, provide a useful guide. The facts there are different. In the instant case P.W. 2, 8 years old, a school boy, has no earnings of his own. The likelihood of being impotent is only 25%. There is however, a likelihood of being sterile. In *Woods* v. *King* Edmund Davies J. after pronouncing that —

"The proper basis is that of fair and reasonable compensation for past, present and future pain and suffering, interference with what I call the ordinary amenities of life, and financial loss",

took into consideration the fact that the plaintiff was a vigorous man still following the manly sport of rock-climbing which he had learned as a commando and that the plaintiff also enjoyed the gentler recreation of gardening. In this case, there is no evidence of special amenities of life enjoyed by P.W. 2 and any attempt to consider future amenities of life would largely be a matter of conjecture. There is also no evidence of any financial loss.

I am of the opinion that whilst the proper basis should be of fair and reasonable compensation for past, present and future pain and suffering, in this particular case, some consideration may also be given on the basis of a fair and reasonable compensation for some financial expenses which may be incurred in pursuing medical treatment.

*Ghulam Hussein's* case may also be distinguished from the present case. There the plaintiff, a male, 27 years old, a Telecoms Department storeman was earning $125.85 a month. The injuries he suffered were more serious than the present case. There was complicated fracture of the pelvis with rupture of the urethra and partial tears of the rectum and the caecum and a lacerated wound 5 inches long on the right thigh. He had to undergo one operation on admission for the injuries to the bladder and bowel. He also developed a pathological dislocation of the right hip and surgery showed that he had a complete rupture of the prostatic urethra and extensive rupture of the pelvis. According to the expert, he would be unable to pass urine or motion normally and another operation would have to be performed on him to make his life more comfortable. He was also likely to remain impotent and sterile and after discharge from the hospital, there was little likelihood that he could lead a comparatively normal life.

The facts in the Singapore case are almost on all fours with the present case except that the damage to the urethra suffered by P.W. 2 is more extensive. P.W. 2 also had to undergo a number of operations and probably more to come. There is very little doubt that P.W. 2 suffered considerable pain and discomfort and will perhaps suffer more pain and discomfort.

Taking into consideration the injuries suffered and bearing in mind the factors I mentioned earlier, I consider it fair and reasonable compensation that a sum of $20,000 be awarded as general damages.

I therefore enter judgment for the first plaintiff a sum of $20,000 as general damages. I also enter judgment for the second plaintiff a sum of $2,355.90 as special damages and costs.

*Judgment for the plaintiffs.*

Solicitors: *Murphy & Dunbar; Lovelace & Hastings.*

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## OOI TEIK CHIN v. PUBLIC PROSECUTOR

**[A.Cr.J. (Lee Hun Hoe J.) February 27, 1970]**

**[Kota Kinabalu — Criminal Appeal No. 2 of 1970]**

*Criminal Law and Procedure — Appeal — Appeal on ground that verdict was against weight of evidence — Not sufficient ground of appeal — Criminal Procedure Code, 1959 s. 259(2).*

In this case it was alleged in an appeal against a conviction that the learned magistrate was wrong in his findings of facts and that the verdict was therefore against the weight of evidence.

**Held,** dismissing the appeal: it was not a sufficient ground of appeal to allege that the verdict was against the weight of the evidence. Under section 259(2) of the Criminal Procedure Code, 1959, it is for the appellant to show that the "conviction is unreasonable or cannot be supported having regard to the evidence".

*Cases referred to:-*

(1) *Goh Ah Too* v. *R.* [1956] M.L.J. 139.

(2) *Aladesuru* v. *R.* [1956] A.C. 49.

MAGISTRATE'S CRIMINAL APPEAL

*Alex Khoo* for the appellant.

*Stephen Foo* for the respondent.

**Lee Hun Hoe J.:** This is an appeal against conviction. I dismissed the appeal and stated that I would give my reasons. I do so now. In the petition it is alleged that the learned magistrate was wrong in his findings of facts and the "verdict was therefore against the weight of the evidence". This is the only ground of appeal.

Care should be taken in the preparation of petition and the wordings of the statute should be followed. Under section 259(2) of the Criminal Procedure Code it is for the appellant to show that the "conviction is unreasonable or cannot be supported having regard to other evidence."

*Mallal's* Criminal Procedure, 4th Edition, page 769 has this passage: —

"In *Goh Ah Too* v. *R.*[1] the grounds of appeal was stated to be that the 'verdict of the jury was against the weight of the evidence.' The court drew counsel's attention to the provision of sub-section (1) of the Court of Criminal Appeal Ordinance and to the decision of the Privy Council in *Aladesuru* v. *R.*[2] where it was laid down that in order to succeed an appellant must show, in the words of the statute, that the 'verdict is unreasonable or cannot be supported having regard to the evidence.' The Privy Council there was of the opinion that it was not a sufficient ground of appeal to allege that the 'verdict is against the weight of evidence;' and that the phrase